

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES AULD)	
Claimant,)	
v.)	
)	CS-00-0450-113 ¹
ALH HOME RENOVATIONS LLC,)	AP-00-0456-681
Respondent,)	and
and)	CS-00-0454-414 ²
)	AP-00-0456-686
EMPLOYERS MUTUAL CASUALTY CO.)	
Insurance Carrier,)	
and)	
)	
OWNERS INSURANCE CO.)	
Insurance Carrier.)	

ORDER

Respondent and Employers Mutual Casualty Co. requests review of the March 1, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Julie Sample.

APPEARANCES

Kevin J. Kruse appeared for Claimant. Ryan D. Weltz, appeared for Respondent and Employers Mutual Casualty Co. (EMC). Abigail Pierpoint appeared for Respondent and Owners Insurance Co. (OIC).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from February 17, 2021, including exhibits A1-A5 and B1; deposition transcript of Claimant taken February 19, 2021; and the documents of record filed with the Division.

ISSUES

¹ CS-00-0450-113; AP-00-0456-681 date of accident 11/17/2016.

² CS-00-0454-414; AP-00-0456-686 date of accident is a series 11/18/16 through 9/21/20.

1. Does the Board have jurisdiction to hear this appeal?
2. Is the work accident of November 17, 2016, the prevailing factor causing the medical condition and need for treatment in Claimant's right shoulder?

FINDINGS OF FACT

Claimant worked for Respondent as a project manager/lead carpenter. He was a working foreman. On November 17, 2016, Claimant was injured moving a refrigerator into a house. At one point, the full weight of the refrigerator was on Claimant. He felt stress in his neck and shoulders.

Claimant received authorized medical treatment for both shoulders from J. Clinton Walker, M.D. Treatment for the left shoulder included two surgeries. The first surgery was on April 26, 2017, and the second surgery August 6, 2020. Conservative treatment was provided for the right shoulder. Dr. Walker released Claimant at maximum medical improvement (MMI) for the right shoulder on November 2, 2017.

EMC referred Claimant to Erich Lingenfelter M.D. for second opinions on both shoulders. Claimant saw Dr. Lingenfelter three times from October 31, 2017, through January 23, 2018. Because the left shoulder was more symptomatic than the right, Dr. Lingenfelter recommended an MRI on the left. Treatment options were discussed for the right shoulder, but Claimant opted not to pursue them. Claimant saw Dr. Lingenfelter on December 10, 2017, to review the left shoulder MRI. Claimant declined surgical intervention, but received a cortisone injection. Dr. Lingenfelter examined both shoulders at Claimant's last appointment. Claimant reported improvement of pain on the left since the injection. Claimant reiterated he did not want to pursue medical treatment for the right shoulder. Dr. Lingenfelter did not provide any additional treatment.

There were two MRIs performed on Claimant's right shoulder. The first MRI was performed on April 21, 2017. Dr. Walker opined the MRI did not "show a rotator cuff or labral (SLAP) tear."³ Dr. Lingenfelter opined the MRI revealed "a very small full-thickness split in the supraspinatus tendon."⁴ In response to Claimant's increased complaints of pain in his right shoulder, Dr. Walker ordered the second MRI, which was performed on July 14, 2020. It revealed tears to the rotator cuff and labrum. Based upon these findings,

³ See P.H. Trans., Resp. Ex. B1.

⁴ See *id.*, Cl. Ex. A2 at 4.

Dr. Walker recommended surgery. He also opined the new medical condition and need for surgery was not the November 17, 2016 injury, but due to his current work activities.

Claimant was evaluated by Prem Parmar, M.D. at the request of his attorney on November 16, 2020. Dr. Parmar opined the prevailing factor for Claimant's right shoulder medical condition and need for treatment was Claimant's initial work-related injury on November 17, 2016. In so doing, he stated "the patient has been symptomatic since the day of injury and has never returned to normal, and has had periods of flare ups as well as periods where he had minor residual issues."⁵

Claimant testified his right shoulder pain complaints never completely went away. The pain is now worse, but continues to be in the same location as it has been since the initial injury on November 17, 2016. Claimant believed he was overcompensating with his right shoulder in an attempt to avoid using his left shoulder. Claimant detailed the measures he took to modify his job duties following his initial injury.⁶

The ALJ found the prevailing factor for Claimant's right shoulder condition, and need for surgery, is the November 17, 2016, work accident.

Respondent and Employers Mutual Casualty Co. request review of the ALJ's decision alleging she erred in deciding Claimant did not sustain a new compensable injury arising out of repetitive use. They argue the ALJ erred in disregarding the opinions of Dr. Walker and the findings of the two right shoulder MRIs.

Respondent and Owners Insurance Co. argue the Board lacks jurisdiction because determining liability between insurance carriers is not an issue for appeal, but is a separate proceeding between carriers. Respondent and OIC contend the sole purpose of this appeal is to determine which insurance carrier should be responsible for Claimant's treatment and TTD.

Claimant argues the Board lacks jurisdiction to hear the appeal because EMC is asking the Board to determine the date of injury, which is not subject to review. Claimant also argues he sustained his burden to prove his right shoulder condition and need for surgery was due to the November 17, 2016, work accident.

PRINCIPLES OF LAW AND ANALYSIS

⁵ See *id.*, Cl. Ex. A4 at 2.

⁶ See Claimant's Depo. at 15, 20-24, 29-30.

1. The Board has jurisdiction to hear this appeal.

K.S.A. 44-534a(a)(2) states in part: "A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board."

The ALJ found Claimant met his burden to prove the prevailing factor for his right shoulder condition and the need for surgery was the November 17, 2016, injury. This Board member is not persuaded by Claimant's argument this is a date of accident issue or OIC's argument this is solely a dispute to determine liability between two insurance carriers. The issue on appeal is whether a subsequent injury and not the initial injury is the prevailing factor causing Claimant's right shoulder condition and need for surgery. Prevailing factor is a disputed issue which is subject to review by the Board.

2. The work accident of November 17, 2016, is the prevailing factor causing the medical condition and need for treatment for Claimant's right shoulder.

The ALJ was "persuaded by the opinion held by Dr. Parmar and in particular, the Claimant's own testimony about his initial injury...the prevailing factor is Claimant's right shoulder condition, and the need for surgery is due to the November 17, 2016, accident."⁷ This Board member agrees with the ALJ's analysis and conclusion.

The parties do not dispute Claimant requires surgery to his right shoulder and has been restricted from work due to the right shoulder. EMC argues the MRI's are the best evidence and the first MRI did not reveal any tears. This is incorrect. Dr. Lingenfelter, selected by Respondent and EMC to provide a second opinion, found a small, full-thickness split in the supraspinatus tendon in the first MRI. This change in the physical structure of Claimant's right shoulder is not mentioned in Respondent's arguments.

Respondent and EMC also argues Dr. Walker, as the treating physician, is in the best position to address the prevailing factor issue. While the Board often defers to the treating physician regarding issues between the parties, it is not always the best evidence. Dr. Walker provided his prevailing factor in response to a "Narrative Request." In his report, he notes the first MRI "did not show a rotator cuff or labral tear." Dr. Walker does not mention Dr. Lingenfelter or his interpretation of the first MRI. This calls into question the foundation of Dr. Walker's prevailing factor opinion.

⁷ See ALJ Order at 3.

Dr. Parmar included Dr. Lingenfelter's findings in his prevailing factor report. Claimant consistently testified the pain in his right shoulder never went away. Although the level of his pain waxed and waned, the location of the pain did not change. Claimant also consistently testified he modified his work activities in an attempt to manage the pain in both shoulders. The Board finds Claimant met his burden of proving the work accident of November 17, 2016, is the prevailing factor causing the medical condition and need for treatment for his right shoulder.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Julie Sample dated March 1, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2021.

CHRIS A. CLEMENTS
APPEALS BOARD MEMBER

c: Via OSCAR

Kevin Kruse, Attorney for Claimant
Ryan Wertz, Attorney for Respondent and Employers Mutual Casualty Co.
Abigail Pierpoint, Attorney for Owners Insurance Co.
Hon. Julie Sample, Administrative Law Judge

⁸ See K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁹ See K.S.A. 2018 Supp. 44-555c(j).